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**NIELSEN, MERKSAMER,
PARRINELLO, MUELLER & NAYLOR, LLP**
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

SACRAMENTO
770 L STREET, SUITE 800
SACRAMENTO, CALIFORNIA 95814
TELEPHONE (916) 446-6752

FAX (916) 446-6106

591 REDWOOD HIGHWAY, #4000
MILL VALLEY, CALIFORNIA 94541
TELEPHONE (415) 389-6800

FAX (415) 388-6874

SAN FRANCISCO

120 MONTGOMERY STREET, SUITE 1055
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE (415) 389-6800

FAX (415) 388-6874

March 24, 1997

VIA FEDERAL EXPRESS

Mr. Edward D. Ryan
Reports Analyst,
Federal Elections Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Response to February 12, 1997 Letter to
MERCK PAC: U.S.

Dear Mr. Ryan:

On behalf of our client, MERCK PAC: U.S., we submit this written response to your February 12, 1997 letter.

Your letter raised issues relating to possible excessive contributions to the Dick Zimmer for Senate Committee ("Zimmer Committee") and the Friends of John Warner 1996 Committee ("Warner Committee"). We appreciate that you have called these issues to our attention.

As an initial matter, and as we discussed by telephone, we would like to notify you that MERCK PAC: U.S. is not affiliated with the DuPont Good Government Fund ("DuPont PAC"), the separate segregated fund of E.I. DuPont de Nemours and Company ("DuPont"). I believe the confusion over this issue arises because MERCK PAC: U.S. is affiliated with a PAC with a similar name, the DuPont Merck Program for Active Citizenship, Inc. ("DuPont Merck PAC"), which is itself affiliated with DuPont PAC.

The relationship between MERCK PAC: U.S. and DuPont Merck PAC is complex, and is set forth fully in the Commission's Advisory Opinion dated June 26, 1992, a copy of which is enclosed. FEC Advice Opinion to Kenneth A. Gross, dated June 26, 1992 (AO 1992-17). As set forth in that Advisory Opinion, Merck & Co., Inc. ("Merck") is a 50% owner of DuPont Merck Pharmaceutical Company ("DuPont Merck"), the entity whose employees established the DuPont Merck PAC. As such, for contribution limits purposes, 50% of each contribution of DuPont

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Merck PAC is attributed to the single contribution limit that DuPont Merck PAC shares with MERCK PAC: U.S.¹

However, DuPont is not legally affiliated with Merck. Therefore, no portion of the contributions of DuPont PAC are attributable to MERCK PAC: U.S., and DuPont PAC and MERCK PAC: U.S. do not share a single contribution limit. This is consistent with the Advisory Opinion previously rendered by the Commission.

Thus, the following contributions to the Warner Committee are attributable to the single contribution limit (\$5,000 per election) shared between MERCK PAC: U.S. and DuPont Merck PAC, in the allocable amounts shown:

<u>Contributor</u>	<u>Date</u>	<u>Amount</u>	<u>Allocable Share</u>	<u>Election</u>
DuPont Merck PAC	10/25/95	\$1,000	\$ <u>500</u>	Primary 1996
Total:			\$ 500	
MERCK PAC: U.S.	02/29/96	\$ 500	\$ 500	General 1996
MERCK PAC: U.S.	05/30/96	\$1,000	\$1,000	General 1996
MERCK PAC: U.S.	10/03/96	\$2,000	\$2,000	General 1996
MERCK PAC: U.S.	10/31/96	\$1,000	<u>\$1,000</u>	General 1996
Total:			\$4,500	

As is evident, because the DuPont PAC contributions are not to be attributed to the contribution limit shared between MERCK PAC: U.S. and DuPont Merck PAC, no contribution limits have been exceeded with respect to the Warner Committee.

The following contributions to the Zimmer Committee, listed according to the election to which they were originally designated, are attributable to the single contribution limit

¹ The other 50% share of the contributions of DuPont Merck PAC is attributable to the contribution limit that DuPont Merck PAC shares with DuPont PAC.

(\$5,000 per election) shared between MERCK PAC: U.S. and DuPont Merck PAC, in the allocable amounts shown:

<u>Contributor</u>	<u>Date</u>	<u>Amount</u>	<u>Allocable Share</u>	<u>Election</u>
MERCK PAC: U.S.	02/95	\$ 500	\$ 500	Primary 1996 ²
DuPont Merck PAC	10/13/95	\$1,000	\$ 500	Primary 1996
DuPont Merck PAC	04/22/96	\$1,000	\$ 500	Primary 1996
Total:			\$1,500	
MERCK PAC: U.S.	11/22/95	\$5,000	\$5,000	General 1996 ³
MERCK PAC: U.S.	07/30/96	\$1,500	\$1,500	General 1996
MERCK PAC: U.S.	10/02/96	\$2,000	\$2,000	General 1996
Total:			\$8,500	

As you can see, MERCK PAC: U.S. and DuPont Merck PAC together contributed only \$10,000, in the aggregate, to the two 1996 Zimmer Committee elections. However, through inadvertence MERCK PAC: U.S. incorrectly attributed excessive contributions to the Zimmer Committee's 1996 General Election. The \$5,000 MERCK PAC: U.S. contribution made on November 22, 1995, should properly have been attributed as follows: \$3,500 to the 1996 Primary Election and \$1,500 to the 1996 General Election.

Accordingly, MERCK PAC: U.S. will indicate this redesignation as a memo entry on Schedule B supporting Line 23 in its report for the current period during which this redesignation is being made. The Zimmer Committee is being notified of this redesignation by a copy of this letter.⁴

² This contribution was actually made to Mr. Zimmer's House reelection committee, but was subsequently transferred to Mr. Zimmer's Senate primary campaign account, and should be attributed as such. MERCK PAC: U.S. will indicate this redesignation as a memo entry on Schedule B supporting Line 23 in its report for the current period during which this redesignation is being made. It is our belief that the Zimmer Committee has already reported this redesignation, and, in any event, is being notified of the redesignation by a copy of this letter.

³ The Zimmer Committee reported this contribution as follows: \$4,500 attributable to the 1996 Primary Election and \$500 attributable to the 1996 General Election.

⁴ As stated above, the Zimmer Committee actually attributed more than \$3,500 of the \$5,000 contribution (\$4,500) to the 1996 Primary Election.

Mr. Edward D. Ryan

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Should you have any questions, please do not hesitate to call me at (415) 389-6800. Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven S. Lucas". The signature is fluid and cursive, with the first name "Steven" and last name "Lucas" clearly distinguishable.

Steven S. Lucas

Enclosure

cc: Ms. Lana Garvin (w/o encl.; via fax)
Merck & Co., Inc.

Ms. Theresa Daniels (w/ encl.; via mail)
Zimmer for Senate

SSL/elf
6115.04



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20542

June 26, 1992

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1992-17

Kenneth A. Gross
Skadden, Arps, Slate, Meagher & Flom
1440 New York Avenue, N.W.
Washington, D.C. 20005-2107

Dear Mr. Gross:

This responds to your letters dated May 12 and April 17, 1992, requesting an advisory opinion on behalf of Du Pont Merck Program for Active Citizenship, Inc. ("Du Pont Merck PAC") concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the affiliation of a political committee of a joint venture partnership with the separate segregated funds of the corporate partners.

Du Pont Merck PAC is a nonconnected political action committee formed by employees of Du Pont Merck Pharmaceutical Company ("Du Pont Merck" or "the Partnership"). Du Pont Merck is a Delaware general partnership equally owned by two corporations, E.I. Du Pont de Nemours and Company ("Du Pont") and Calgon Corporation ("Calgon"). Calgon is an indirect wholly-owned subsidiary of Merck & Co., Inc. ("Merck"). Du Pont sponsors a separate segregated fund named the E.I. Du Pont de Nemours and Company Good Government Fund ("Du Pont PAC"), and Merck sponsors an SSP named Merck & Co., Inc. PAC ("Merck PAC").

Du Pont Merck is a pharmaceutical company established in 1991, which employs 4,000 persons and which made over \$210 million in research and development expenditures on drugs for various diseases during its first year.

1/ According to their filings with the Commission, Du Pont PAC and Merck PAC are active, registered political committees.

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Du Pont Merck has a six member Board of Directors, three members chosen by and representing Du Pont and three chosen by and representing Merck. The lists of directors in the Partnership's quarterly reports indicate that these members are senior officers of the two companies, including senior vice-presidents and Merck's chief financial officer. The President and CEO of Du Pont Merck had previously been a vice-president of Du Pont.

The Partnership's Board makes certain major decisions, while other decisions are reserved for the Partnership's officers and employees without Board input. Examples of the decisions that are reserved to the Board are acquisition of other companies; making large capital investments; admitting a new partner; amending the partnership agreement; filing for bankruptcy; making major borrowing commitments; approving a charitable or political contribution in excess of \$50,000; and authorizing certain other large expenditures.

The Board also has the authority to appoint and dismiss key employees of Du Pont Merck, to set their compensation terms, and to enter into employment contracts with such key employees as the president, the chief financial officer, and officers with principal authority for sales, marketing and manufacturing.

Although the Board may appoint ex-officio (non-voting) members from among the officers of Du Pont Merck and the President is automatically an ex-officio member, the number of voting members of the Board may not be enlarged by either of the two partners. You state that neither Du Pont nor Merck has any advantage over the other partner in convening a quorum or in voting power generally, and that neither partner has a predominant management role or controlling position. In the event of a Board deadlock, either Du Pont or Merck may request that the deadlocked issue be resolved by referring it to the chief executive officers of Du Pont and Merck. If the two CEOs cannot resolve the issue, there is no further provision for resolution. With respect to the discharge of a key employee, neither partner may unreasonably withhold its consent to the recommendation of one partner for such discharge.

Du Pont Merck PAC is incorporated in the District of Columbia. It raises contributions by soliciting the executive and administrative personnel of Du Pont Merck. It is responsible for indemnifying its own directors and officers, pays for its own expenses, and does not coordinate its activities with Du Pont PAC or Merck PAC. You ask whether Du Pont Merck PAC is affiliated with Du Pont PAC and Merck PAC. You also ask, in the event the Commission determines that Du Pont Merck PAC is affiliated with Du Pont PAC and Merck PAC, whether Du Pont or Merck may pay the administration and solicitation costs of Du Pont Merck PAC.

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The Act and Commission regulations provide for the affiliation of committees established, financed, maintained, or controlled by the same corporation, labor organization, person, or group of persons, including any parent, subsidiary, branch, department, or local unit thereof. 2 U.S.C. §461a(a)(5); 11 CFR 100.5(g)(2) and 110.3(a)(1). In making this determination, the Commission may examine the relationship between organizations that sponsor committees, the committees themselves, or between one sponsoring organization and a committee established by another organization. 11 CFR 100.5(g)(4)(i) and 110.3(a)(2)(i).

Commission regulations include circumstantial factors for determining whether an organization is an affiliate of a corporation. 11 CFR 100.5(g)(4)(ii) and 110.3(a)(3)(ii). These criteria include (1) whether a sponsoring organization has the ability to direct or participate in the governance of another sponsoring organization through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures; (2) whether a sponsoring organization has the authority or ability to hire, appoint, demote or otherwise control the officers or other decisionmaking employees of another sponsoring organization; (3) whether a sponsoring organization has common or overlapping officers or employees with another sponsoring organization which indicates a formal or ongoing relationship between the sponsoring organizations; (4) whether a sponsoring organization has any members, officers or employees who were members, officers, or employees of another organization indicating a formal or ongoing relationship between the sponsoring organizations; and (5) whether a sponsoring organization had an active or significant role in the formation of another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(A), (C), (E), (F), and (I) and 110.3(a)(3)(ii)(A), (C), (E), (F), and (I).

By virtue of having 50 percent control each over the Board of Directors, the assent of Du Pont and Merck are each necessary to enable Du Pont Merck to take a significant number of major decisions. Included among these decisions is the appointment, dismissal, and compensation of key employees. The Board of Directors itself consists of high-ranking officers of the two partners, and the president and CEO of the partnership had been a high-ranking officer of Du Pont. With respect to the final factor listed above, Du Pont and Merck were the creators of Du Pont Merck.

Despite the fact that neither Du Pont nor Merck has the predominant management role or controlling position, a review of the factors with respect to each of the companies leads the Commission to conclude that Du Pont Merck is an affiliate of each of the companies. This is consistent with the Commission's conclusion in Advisory Opinion 1979-36 where two

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corporations each owned 50 percent of the stock of a third corporation they jointly created; the Commission concluded that the PACs of the parent corporations would each be affiliated with the third corporation's PAC but not with each other. See also Advisory Opinion 1983-19. Compare Advisory Opinion 1984-36.

The Commission has long held that affiliates may include entities other than corporations, such as partnerships. Advisory Opinions 1989-8, 1987-34, and 1983-48. Although the Act does not provide for the establishment by partnerships of separate segregated funds, the Commission has concluded that a PAC sponsored by a partnership is affiliated with the SSF of an affiliated corporation. In Advisory Opinion 1979-77, the Commission deemed the PAC of a partnership to be affiliated with the SSF of a corporation over which the partnership had a controlling interest. This was affirmed and clarified when the Commission stated that, even though partnership PACs do not carry the same restrictions on solicitation that SSFs do, a PAC of a partnership that is an affiliate of a corporation that had an SSF may not make unlimited solicitations but is limited in the way that a corporate SSF would be. Advisory Opinion 1989-8. See also Advisory Opinion 1983-48.

Based on the foregoing, the Commission concludes that Du Pont Merck PAC is affiliated with Du Pont PAC and is affiliated with Merck PAC.^{2/}

You ask whether Du Pont and Merck may pay the administration and solicitation costs of Du Pont Merck PAC. Under 1 U.S.C. §441b(b)(2)(C), a corporation is permitted to use its general treasury funds to pay for the costs of establishing, administering, and soliciting contributions to its separate segregated fund. The payment of such expenses is also explicitly excepted from the Act's definitions of "contributions" and "expenditures." 2 U.S.C. §431(8)(3)(vi) and (9)(B)(v). The Commission has permitted a corporation that has an affiliated relationship with another corporation to pay the administration and solicitation costs for the

^{2/} In view of the joint ownership and control over Du Pont Merck in a 50-50 partnership, and given Commission regulations applicable in the related context of partnerships (further discussed below), the Commission concludes that, for contribution limit purposes, each Du Pont Merck PAC contribution should be apportioned half to the limit shared with Du Pont PAC and half to the separate limit shared with Merck PAC, or to an alternative apportionment that is also agreed upon by the two SSFs. See Advisory Opinion 1987-34 for further details as to applicable limits, apportionment of the contributions, and the provision and maintenance of written instructions. See also 11 CFR 110.1(e).

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letter's 58F. Advisory Opinion 1983-19. In view of the status of Du Pont Merck PAC as an affiliated committee with the separate segregated funds of Du Pont and Merck, the Commission concludes that Du Pont and Merck may pay administration and solicitation costs of Du Pont Merck PAC.

Although not expressly included in your questions, your request raises the question of whether Du Pont Merck itself may pay the administrative and solicitation costs of its PAC without those payments being treated as contributions. The Act does not extend to a partnership the ability granted to a corporation at 2 U.S.C. §441b(b)(2)(C) to conduct itself as a connected organization and benefit from the above-described exemption for establishment, administration, and solicitation costs. Advisory Opinions 1990-20, 1982-53, 1981-56, and 1981-54. See California Medical Association v. Federal Election Commission, 453 U.S. 183 (1981). Nevertheless, the Commission has treated a joint venture partnership of corporations differently as a result of its relationship with corporations. A partnership consisting of two corporate partners was permitted to share, with a corporation owned by the partnership, the expenses of establishing and financing a payroll deduction plan under 11 CFR 114.5(k)(1), without a contribution by the partnership resulting. The Commission stated that the joint venture partnership status should not preclude such involvement in view of the fact that the partnership is owned 50-50 by corporations. Advisory Opinion 1987-24. Similarly, Du Pont Merck is owned in its entirety by two corporations with which it is affiliated. Accordingly, Du Pont Merck may pay the administrative and solicitation expenses of Du Pont Merck PAC without a resulting contribution from Du Pont Merck.

This conclusion is compatible with the dual attribution principle for partnership contributions at 11 CFR 110.1(e). Contributions by partnerships are not only attributed to the partnership as a whole but are also attributed to partners. The administrative and solicitation support may be construed as coming from the affiliated corporations. To the extent that Advisory Opinions 1981-56 and 1981-54 would prohibit joint venture partnerships in the position of Du Pont Merck, i.e., partnerships owned entirely by corporations and affiliated with at least one of those corporations, from paying establishment, administrative, and solicitation costs without contribution consequences, those opinions are hereby superseded.

Finally, the Commission notes that Du Pont Merck PAC should amend its statement of organization to identify Du Pont PAC and Merck PAC as affiliated committees. 2 U.S.C. §433(b)(2). In addition, in the event that Du Pont Merck PAC functions as a separate segregated fund, it will have to identify a connected organization on its statement of organization. Id. Commission regulations provide that a

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connected organization may be a corporation which directly or indirectly establishes, administers, or financially supports a political committee but makes no provision for a partnership in that role. 11 CFR 100.6(a). Therefore, if support is provided directly by Du Pont and Merck, or indirectly by those two corporations by virtue of support from Du Pont Merck, Du Pont Merck PAC must amend its statement of organization by identifying Du Pont and Merck as its connected organizations. See 11 CFR 102.1(c).

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f.

Sincerely yours,



Scott S. Thomas
Vice-Chairman for the
Federal Election Commission

Enclosures (AOs 1990-20, 1989-8, 1987-24, 1984-36, 1983-48,
1983-19, 1981-56, 1981-54, 1979-77, and
1979-56).

Federal Election Commission
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